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Public Prosecutor v Leila Fatemi & Anor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–282–11 OF 2012
AZIAH ALI, ZAKARIA SAM AND AHMADI ASNAWI JJCA
1 DECEMBER 2015

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Criminal Procedure — Appeal — Trafficking — Prosecution's appeal — Decision of trial judge to reduce charge — Whether prosecution failed to prove its case against respondents beyond reasonable doubt on charge of trafficking — Whether respondents' defence had cast reasonable doubt on prosecution's case — Whether trial judge failed to consider relevant factors — Whether respondents had rebutted presumption of trafficking on a balance of probabilities — Whether convictions and sentences should be set aside

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On 19 February 2011 at about 8.10pm, two Iranians, Leila Fatemi ('R1') and Sahar Mohamaadi ('R2'), ('the respondents') had arrived in the Kuala Lumpur International Airport. They were spotted by police officers, who were monitoring the movements of passengers in the airport, to be acting in a suspicious manner. When the respondents had collected their individual baggage they were approached by a police officer and directed to a search and scanning area. The police then searched the respondents' bags and recovered the respondents' clothing and two plastic bags containing crystalline substances concealed underneath the bottom layer of both bags. The crystalline substances discovered were later confirmed by the chemist to be 1750.2g and 2160.8g of methamphetamine, a dangerous drug. The respondents were charged with trafficking in the dangerous drug under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the end of the prosecution case the trial judge found that the prosecution had failed to make out a prima facie case against both respondents. Thus both respondents were acquitted and discharged without their defence being called. The prosecution appealed to the Court of Appeal, which remitted the case back to the High Court with the directive to call for their defence. In their defence both respondents chose to give written unsworn statements from the dock. The gist of the respondents' defence was that they were innocent carriers and that the bags belonged to one Farhan, who had asked them to carry the bags to Malaysia. The trial judge found that the prosecution had not re-examined the subject matter 'Farhan', which formed the basis of the respondents' defence. In the circumstances, the trial judge found that the prosecution had failed to prove its case against the respondents beyond reasonable doubt on the charge of trafficking. The trial judge thus reduced the charges against the respondents and found them both guilty of the reduced charges under s 39A(2) of the Act. This was the

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prosecution's appeal against that decision. It was the prosecution's submission that the respondents' defence had not cast a reasonable doubt on the prosecution case.

Held, allowing the appeal:

(1) In arriving at his decision to reduce the charge against the respondents the trial judge had been very much influenced by the single fact that the investigating officer ('the IO') had failed to investigate the truth of the respondents' claim in respect of Farhan. However, he had failed to consider other relevant factors, such as the fact that the respondents had failed to provide relevant information on Farhan so as to enable the IO to conduct further investigations to trace Farhan. In addition, the respondents had not mentioned that the bags belonged to Farhan at the first opportunity to exonerate themselves but had chosen to remain silent. This was not the conduct of an innocent person. The late disclosure of the character Farhan also suggested that it was an afterthought defence and of little value (see paras 20–21).

(2) The trial judge had also failed to ask himself, whether if the bags really belonged to Farhan, what was Farhan's instructions to the respondents once they reached Penang. This lack of instruction by Farhan by itself created doubt on the respondents' defence. Therefore, the defence of the respondents would most likely amount to willful blindness, which was not recognized in law (see paras 21–22).

(3) Even if Farhan was the actual trafficker, it did not detract the fact that both respondents were arrested together with their bags and that the drugs were found concealed inside their bags to escape the detection by the authorities concerned, which amounted to trafficking in the drugs into Malaysia. As such, the respondents had failed to raise reasonable doubt in respect of mens rea possession of the drugs, and on the balance of probabilities failed to rebut the presumption of trafficking under s 37(da) of the Act. Hence the convictions and sentences of the High Court were set aside and substituted with convictions under s 39B(1) of the Act and both respondents were sentenced to death (see paras 23–25).

[Bahasa Malaysia summary

Pada 19 Februari 2011, lebih kurang pukul 8.10 malam, dua orang warganegara Iran, Leila Fatemi ('R1') dan Sahar Mohamaadi ('R2'), ('responden-responden') tiba di Lapangan Terbang Kuala Lumpur. Mereka dikesan oleh pegawai polis yang memantau pergerakan penumpang-penumpang di lapangan terbang, dan dikatakan kelihatan mencurigakan. Apabila responden-responden mengambil beg masing-masing, mereka didekati oleh seorang pegawai polis dan diarahkan ke tempat carian dan imbasan. Pegawai polis kemudian menjalankan carian pada beg-beg

responden-responden dan menjumpai pakaian responden-responden dan dua beg plastik mengandungi serbuk kristal, tersorok di lapisan bawah kedua-dua beg. Serbuk kristal yang dijumpai kemudian disahkan oleh ahli kimia sebagai 1750.2g dan 2160.8g methamphetamine, sejenis dadah berbahaya. Responden-responden didakwa mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Di akhir kes pendakwaan, hakim bicara mendapati pihak pendakwaan gagal membuktikan kes prima facie terhadap kedua-dua responden. Oleh itu, kedua-dua responden dilepaskan dan dibebaskan tanpa pembelaan mereka dipanggil. Pihak pendakwaan merayu ke Mahkamah Rayuan, yang mengembalikan kes tersebut ke Mahkamah Tinggi dengan arahan agar pembelaan mereka dipanggil. Dalam pembelaan mereka, responden-responden memilih memberi keterangan tidak bersumpah daripada kandang saksi. Inti pati pembelaan responden-responden adalah bahawa mereka pembawa tidak bersalah dan beg-beg tersebut milik seorang bernama Farhan, yang meminta mereka membawa beg-beg tersebut ke Malaysia. Hakim bicara memutuskan bahawa pihak pendakwaan tidak memeriksa semula hal perkara 'Farhan', yang membentuk asas pembelaan responden-responden. Dalam hal keadaan tersebut, hakim bicara memutuskan bahawa pihak pendakwaan gagal membuktikan kesnya terhadap responden-responden melampaui keraguan munasabah bagi pertuduhan pengedaran. Hakim bicara seterusnya mengurangkan pertuduhan responden-responden dan mendapati kedua-duanya tidak bersalah dan mengurangkan pertuduhan di bawah s 39A(2) Akta. Ini rayuan pihak pendakwaan terhadap keputusan. Pihak pendakwaan menghujahkan bahawa pembelaan responden-responden tidak membangkitkan keraguan munabasah terhadap kes pihak pendakwaan.

Diputuskan, membenarkan rayuan:

(1) Dalam memutuskan untuk mengurangkan pertuduhan responden-responden, hakim bicara amat terpengaruh dengan fakta tunggal bahawa pegawai penyiasat ('IO') gagal menyiasat tentang kebenaran tuntutan responden-responden berkenaan Farhan. Walau bagaimanapun, beliau gagal mempertimbangkan faktor-faktor relevan yang lain seperti fakta bahawa responden-responden gagal mengemukakan maklumat relevan tentang Farhan untuk membolehkan IO menjalankan siasatan lanjut bagi menjejaki Farhan. Tambahan lagi, responden-responden tidak menyatakan bahawa beg-beg tersebut milik Farhan pada peluang terawal untuk melepaskan diri mereka tetapi memilih untuk kekal berdiam. Ini bukan tindakan seorang yang tidak bersalah. Pendedahan lewat watak Farhan juga mencadangkan ini satu pembelaan fikir kemudian dan bernilai rendah (lihat perenggan 20–21).

(2) Hakim bicara juga gagal bertanya pada dirinya sama ada kedua-dua beg milik Farhan; apa arahan Farhan kepada responden-responden setibanya mereka di Pulau Pinang. Ketiadaan arahan oleh Farhan dengan

A sendirinya membangkitkan keraguan pada pembelaan responden-responden. Oleh itu, pembelaan responden-responden mungkin terjumlah kepada kebutaan sengaja, yang tidak diiktiraf oleh undang-undang (lihat perenggan 21–22).

B (3) Jika pun Farhan adalah pengedar sebenar, ini tidak menjejaskan fakta bahawa kedua-dua responden ditangkap bersama-sama dengan beg-beg mereka dan bahawa dadah dijumpai tersorok dalam beg-beg mereka untuk mengelak pengesanan oleh pihak berkuasa berkenaan, yang mengakibatkan kepada pengedaran dadah ke dalam Malaysia. Oleh itu, C responden-responden gagal membangkitkan keraguan munasabah berkenaan milikan mens rea dadah dan atas imbangan kebarangkalian gagal membangkitkan anggapan pengedaran di bawah s 37(da) Akta. Oleh itu, sabitan dan hukuman Mahkamah Tinggi diketepikan dan diganti dengan sabitan-sabitan di bawah s 39B(1) Akta dan kedua-dua responden dijatuhkan hukuman mati (lihat perenggan 23–25).]

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Notes

For cases on appeal in general, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 171–835.

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Cases referred to

PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
Tan Kim Ho & Anor v PP [2009] 3 MLJ 151, FC (refd)
Teng Howe Sing v PP [2009] 3 MLJ 46; [2008] 5 CLJ 186, FC (refd)

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Legislation referred to

Courts of Judicature Act 1964 s 60
Dangerous Drugs Act 1952 ss 12(2), 37(da), 39A(2), 39B, 39B(1)
Evidence Act 1950 s 8

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Appeal from: Criminal Appeal No 45–45–09 of 2011 (High Court, Penang).

Lailawati bt Ali (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
N Sivananthan (Syazlin Mansur with him) (Sivananthan & Co) for the respondent.

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Zakaria Sam JCA:

BACKGROUND

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[1] The first respondent ('R1') was charged under s 39B of the Dangerous Drugs Act 1952 ('the DDA') for trafficking in 1750.2g of methamphetamine.

[2] The second respondent ('R2') was charged under the same section of the Act for trafficking 2160.8g of methamphetamine.

[3] Both of them were jointly tried.

PROSECUTION'S CASE

[4] On 19 February 2011 at about 8.10pm, the complainant ('PW9') and his team of police officers were at the KLIA monitoring the movements of both domestic and international passengers. After an aircraft from Singapore had landed, PW9 spotted R1 and R2 who were acting in suspicious manner. After R1 and R2 had collected their individual baggage, PW9 approached them. PW9 identified himself as a police officer. He communicated with them in simple English language and was sure that both R1 and R2 understood him. He found that they hail from Iran. He asked for their passports. R1 had with him a chocolate-coloured rolley bag ('P17') while R2 was carrying a light coloured blue trolley bag ('P18').

[5] PW9 then directed R1 and R2 to bring their bags to the scanning machine and he asked PW7, a custom officer to scan the bags. PW7 and PW9 then saw suspicious green images inside the two bags which were scanned twice. After the scanning was done, PW9 brought R1 and R2 and their bags to the narcotics office at the airport.

[6] Upon the instruction of PW9, PW10 and PW6 opened R1's bag ('P17') and took out all the clothings. They pressed the bottom of the bag and felt something hidden there. They pulled out the bottom layer and removed the whole handle and the attached bars. They found one transparent plastic bag containing crystalline substance suspected to be syabu hidden at the bottom layer of the bag. PW9 informed R1 about the finding and R1 cried.

[7] PW9 then directed PW11 and Det Cpl Abdul Wahab to open R2's bag ('P18'). They took out her clothings from the bag. PW11 then pulled out the bottom layer and removed the bag handle. They discovered a transparent plastic packet containing substance suspected to be syabu hidden at the bottom of the bag.

[8] R1, R2 and the incriminating exhibits were then handed over to PW12, the investigating officer.

[9] The chemist ('PW5') confirmed that the substance in the bag P17 contained 1750.2g and from R2's bag P18 contained 2160.8g of methamphetamine.

FINDINGS AT THE END OF PROSECUTION CASE

[10] At the end of the prosecution case, the learned judicial commissioner (trial judge) found that the prosecution had failed to make out a prima facie case against both respondents. Both accused were acquitted and discharged without their defence being called.

[11] Dissatisfied, the prosecution appealed against the said decision. The Court of Appeal allowed the appeal and remitted the cases back to the High Court with the directive to call for their defence.

DEFENCE CASE

[12] Both the respondents chose to give written unsworn statements from the dock which were marked as D39 (R1's statement) and D40 (R2's statement).

[13] Based on their written statements, the defence of both respondents are that they were given the bags which contained the drugs by R2's fianc[e9a520]by the name of 'Farhan'. Farhan was the one who had checked in the bags. Both of them claimed that they had no knowledge of the drugs inside the bags.

[14] R1 claimed that she was merely accompanying R2 to Malaysia.

FINDINGS AT THE END OF DEFENCE CASE

[15] The trial judge found that the prosecution had failed to prove its case against both the appellants beyond reasonable doubt on the original charge of trafficking. Instead the court made a finding of custody or control of the drugs under s 12(2) of the DDA and punishable under s 39A(2) of the same Act. The trial judge reduced the charges and accordingly found both the appellants guilty and convicted them. Each of the appellants was sentenced to eight years imprisonment with effect from the date of their arrest that is 19 February 2011.

[16] The prosecution being dissatisfied with the decision, filed this appeal.

THE APPEAL

[17] There is only a single issue raised by appellant in this appeal ie whether the defence of the respondents had cast a reasonable doubt on the prosecution case.

OUR DECISION

[18] The gist of the appellants' defence is that they were innocent carriers. The bags belonged to Farhan who had asked them to carry the bags to Malaysia. They had no knowledge of the presence of the drugs hidden inside the bags.

[19] PW12 when cross-examined by learned counsel for R2 admitted that R2 had mentioned Farhan's name. When asked further whether he had tried to trace Farhan, PW12 answered that he had tried to call Farhan through the number which he obtained from R2's handphone but no one answered it. He did not resort to other means to trace Farhan.

[20] Upon the above piece of evidence the trial judge concluded:

> It is noteworthy to say that the learned deputy public prosecutor did not re-examine at all on the subject matter 'Farhan' which forms the basis of the defence for SM and indirectly for LF. When the prosecution did not re-examine such an important aspect of the defence from SM and LF, ultimately also for LF, it is deemed that it had accepted the testimony of PW12 in regard the person called 'Farhan' to be true.

[21] Obviously the trial judge was very much influenced by this single fact alone when he reduced the charge. The trial judge had however failed to consider the following relevant factors:

(a) it was the respondents who raised the name of Farhan, but they had failed to provide the relevant information on Farhan for PW12 to investigate the truth of respondents' claim;

(b) when both the respondents were detained by PW6 and then investigated by PW12, they did not mention to PW6 or even PW12 that the bags belonged to Farhan. This is supposed to be the first opportunity to exonerate themselves but they chose to remain silent. This is not a conduct of an innocent person: see *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2008] 5 CLJ 186 and *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585;

(c) it was never suggested to PW12 or PW6 that Farhan was the real trafficker and the drugs in the bags were his, given to the respondents

without their knowledge. The late disclosure of the character 'Farhan' until the defence stage, suggests that it was an afterthought defence and of little value: *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151;

(d) PW12 the investigating officer had done fittings on the ladies clothes found in both bags. This is his evidence at p 140 RR *Jld* 2:

> Saya dapati pada beg pertama milik Laila Fatemi pakaian tersebut sesuai dengan bentuk tubuh badan OKT begitu juga pakaian dalam beg kedua sesuai dengan OKT2.
>
> Obviously they were lying when they said that these bags belonged to Farhan. Lying is also a conduct relevant under s 8 of the Evidence Act 1950; and

(e) the trial judge also failed to ask himself, whether if the bags really belonged to Farhan, what was Farhan's instruction to them once they reached Penang, what to do with the bags or to whom the bags are to be handed over. The lack of instruction by Farhan by itself creates doubt on their defence.

[22] We were of the view that the defence of the respondents only amount to willful blindness which is not recognised in law.

[23] Even if we were to accept the fact that Farhan was the actual trafficker, it does not detract the fact that both respondents were arrested together with their bags and that the drugs were found concealed inside their bags to escape the detection by the authorities concerned, which amounted to trafficking in the said drugs into Malaysia.

[24] We found that the respondents had failed to raise reasonable doubt in respect of mens rea possession of the said drugs, and on the balance of probabilities failed to rebut the presumption of trafficking under s 37(da) of the Act.

CONCLUSION

[25] In exercising our jurisdiction under s 60 of the Courts of Judicature Act 1964, we unanimously allowed the appeal by the prosecution. The convictions under s 12(2) of the DDA and sentences under s 39A(2) of the same are set aside and substituted with convictions under s 39B(1) of the Act and both the respondents are sentenced to death.

Appeal allowed.

Reported by Kohila Nesan